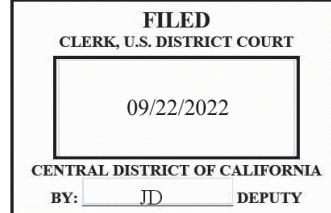


1 XINGFEI LUO
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5 Petitioner in Pro Se
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 XINGFEI LUO,

No. 8:22-CV-01640-MEMF-KES

12 Petitioner,
13 v.
14 THE PEOPLE OF THE STATE OF
15 CALIFORNIA
16 Respondent.

**RESPONSE TO ORDER TO SHOW
CAUSE WHY THE PETITION
SHOULD NOT BE DISMISSED AS
MIXED (DKT. 10)**

17 Action filed: September 6, 2022
18
19

20 Xingfei Luo (Petitioner) respectfully submits the following response to the court's
21 order to show cause why the Petition should not be dismissed as mixed (Dkt. 10):

22 **I. CLAIMS AT ISSUE**

23 Without assistance of counsel Petitioner's previous claims were mixed with other
24 claims and scattered throughout her petition. See *Woods v. Carey*, 525 F.3d 886, 889-
25 90 (9th Cir. 2008) (holding that courts should liberally construe pro se documents);
26 *Medley v. Runnels*, 506 F.3d 857, 863 (9th Cir. 2007) (en banc) (concluding petitioner had
27 exhausted where arguments made were not identical but the core constitutional issue was
28 the same).

1 Claim Seven: “Perjured Testimony/False evidence – report to police the following
2 week after Sep 7 2018

3 See Dkt. 6, p. 46-47, 75, from the very first habeas petition Petitioner has alleged
4 that the alleged victim lied about many things, the prosecution withheld the evidence of
5 his lies, and Petitioner’s trial counsel failed to present the alleged victim’s lies to the jury.

6 Claim Eight: “Perjured Testimony/False evidence – It was dark on Sep 18, 2018”

7 See Dkt. 6, p. 49, 71, 75, same reason as claim seven.

8 Claim Nine: “Violation of Fifth Amendment – Unlawfully Introducing
9 Petitioner’s Compelled Testimony, While At the Same Time Misrepresenting
10 Petitioner’s Prior Testimony”

11 See Dkt. 6, p. 53-55.

12 Claim Nineteen: “Unreasonable Determination of The Facts In Light of The
13 Evidence Presented in The State Court Proceeding Under 28 U.S.C. § 2254(d)(2)”

14 This claim is under federal procedural law therefore Petitioner did not present it
15 before state courts.

16 Claim Twenty-Five: “Violation of Confrontation Clause of the Sixth Amendment
17 and Due Process – Admission of inadmissible hearsay”

18 Dkt. 6, p. 30. Petitioner specifically alleged that her conviction is a violation of her
19 right to (5) confrontation and compulsory process. Throughout her petition Petitioner
20 alleged that the alleged victim was the only witness testified. This violation is so obvious
21 and recognized even by the state court itself. See Dkt. 3, p. 4 (Stating that the victim was
22 the sole witness at trial.)

23 Claim Twenty-Six: “Violation of Sixth and Fourteenth Amendments – Improper
24 permitting amendment”

25 See Dkt. 6, p. 42. Petitioner specifically alleged that not only the trial court erred in
26 denying Petitioner’s motion to dismiss, 720 days after the complaint was filed, despite no
27 finding of good cause to justify any belated amendment, the trial court erred in permitting
28 the people to amend the complaint.

1 Claim Twenty-Eight: “Violation of Sixth and Fourteenth Amendments – the trial
2 court erred in denying the Petitioner’s motion to dismiss”

3 See Dkt. 6, p. 42. Petitioner specifically alleged that not only the trial court erred in
4 denying Petitioner’s motion to dismiss, 720 days after the complaint was filed, despite no
5 finding of good cause to justify any belated amendment, the trial court erred in permitting
6 the people to amend the complaint.

7 Claim Twenty-Nine: “Violation of Sixth and Fourteenth Amendments – the trial
8 court erred in denying Petitioner’s *Marsden* motion”

9 See Dkt. 6, p. 18, 114. Petitioner specifically alleged her right to a conflict-free
10 counsel was violated.

11 Claim Thirty-Three: “Actual Innocence”

12 See Dkt.6, p. 117, Petitioner specifically asked the Supreme Court to act to find
13 Petitioner actually innocent.

14 Claim Thirty-Four: “Section 2254(d) Does Not Bar Relief.”

15 This claim is under federal procedural law therefore Petitioner did not present it
16 before state courts.

17 **II. RECORD OF DIRECT APPEAL**

18 Under California law misdemeanor conviction appeal is reviewed by Superior
19 Court Appellate Division instead of Court of Appeal. Under California Rules of Court
20 Rule 8.1005(1) a party may serve and file an application asking the appellate division to
21 certify a case for transfer at any time after the record on appeal is filed in the appellate
22 division but no later than 15 days after:

23 (A) The decision is sent by the court clerk to the parties;

24 (B) A publication order restarting the finality period under rule 8.888(a)(2) is sent
25 by the court clerk to the parties;

26 (C) A modification order changing the appellate judgment under rule 8.888(b) is
27 sent by the court clerk to the parties; or

28 (D) A consent is filed under rule 8.888(c).

1 Petitioner's application to transfer the direct appeal to court of appeal was denied
2 on February 25, 2022 by the appellate division of superior court.

3 Under California Rules of Court Rule 8.1006(a) a party may file a petition in the
4 Court of Appeal asking for an appellate division case to be transferred to that court only if
5 an application for certification for transfer was first filed in the appellate division and
6 denied.

7 Petitioner's petition to transfer the direct appeal to court of appeal was denied on
8 March 3, 2022 by court of appeal. Dkt. 6, p. 12.

9 Petitioner has no right to petition for review by California Supreme Court because
10 her direct appeal was not reviewed by California Court of Appeal. Therefore, there is no
11 record of a direct appeal to the California Supreme Court. As a result, Petitioner has filed
12 a petition for a writ of certiorari with the U.S. Supreme Court.

13 III. WAYS TO OVERCOME PROCEDURAL DEFAULT

14 A petitioner can overcome procedural default and obtain federal review of the
15 merits of his claim in one of two ways. First, a petitioner overcomes procedural default if
16 he presents sufficient evidence to "demonstrate that failure to consider the claims will
17 result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750
18 (1991). To make this showing, a petitioner's case must fall within the "narrow class of
19 cases . . . [involving] extraordinary instances when a constitutional violation probably has
20 caused the conviction of one innocent of the crime." *McCleskey v. Zant*, [499 U.S. 467, 494, 111 S.Ct. 1454, 113 L.Ed.2d 517](#) (1991). Second, a petitioner may overcome
21 procedural default by making "an adequate showing of cause and prejudice" for his failure
22 to exhaust his state court remedies. *Strickler v. Greene*, [527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286](#) (1999).

25 IV. PETITIONER HAS DEMONSTRATED A FUNDAMENTAL 26 MISCARRIAGE OF JUSTICE

27 Petitioner is undoubtedly a victim of a miscarriage of justice. The number of
28 constitutional violations presented by Petitioner is outrageous and has caused the

1 conviction of Petitioner, who is innocent, of the crimes. The only "crime" Petitioner
 2 committed is she was too poor to hire attorneys both in the family court and criminal court
 3 proceedings.

4 **V. CAUSE AND PREJUDICE TO EXCUSE PROCEDURAL DEFAULT**

5 An objective factor outside of a petitioner's control (e.g., ineffective assistance of
 6 counsel or a basis for the claim that was previously unavailable) could
 7 constitute cause. *Murray v. Carrier*, 714 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d
 8 397 (1986); *McCleskey v. Zant*, 499 U.S. 467, 497, 111 S.Ct. 1454, 113 L.Ed.2d
 9 517 (1991). The petitioner can meet the prejudice prong if he demonstrates "that the
 10 errors . . . worked to his *actual* and substantial disadvantage, infecting his entire
 11 [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599,
 12 603 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71
 13 L.Ed.2d 816 (1982)). A petitioner can demonstrate a fundamental miscarriage of justice
 14 by "establishing] that under the probative evidence he has a colorable claim of factual
 15 innocence." *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) (quotation marks omitted).

16 Therefore, even if the court determines that the claims at issue were not presented
 17 before the state courts the state's denial to appoint counsel excuses Petitioner's failure. To
 18 present any claims in accordance with the State's procedures a prisoner likely needs an
 19 effective attorney. The same would be true if the State did not appoint an attorney to assist
 20 the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law,
 21 may not comply with the State's procedural rules or may misapprehend the substantive
 22 details of federal constitutional law. Cf., e.g., *Halbert v. Michigan*, 545 U.S. 605, 620–621
 23 (2005).

24 For post conviction relief, Petitioner did not receive ineffective assistance of
 25 counsel. Petitioner did not receive any assistance of counsel at all. For each state court
 26 habeas petition Petitioner moved the state court to appoint counsel but each of Petitioner's
 27 requests for appointment of counsel was denied. Such denial constitutes sufficient cause
 28 and prejudice to excuse the procedural default resulting from Petitioner's failure to

1 exhaust her state remedies under 28 U.S.C. § 2254(b)(1)(B)(ii).

2 Petitioner has suffered actual prejudice from violations of federal law. Requiring
 3 Petitioner to go back to state court further prejudices her.

4 **VI. ACTUAL INNOCENCE TO OVERCOME PROCEDURAL
 5 DEFAULT**

6 Even if the court finds that the state's denial to appoint counsel does not constitute
 7 sufficient cause and prejudice to excuse the procedural default Petitioner's actual
 8 innocence can overcome the procedural default. See *Schlup v. Delo*, 513 U.S. 298, 315-
 9 317 (1995) (Holding that a claim of actual innocence can excuse an otherwise
 10 procedurally barred claim, e.g. a petitioner who procedurally defaults his claims can
 11 overcome the procedural bar if he successfully raises a claim of actual innocence—that is,
 12 if he "raise[s] sufficient doubt about [his] guilt to undermine confidence in the result.)

13 The Supreme Court held in *Schlup v. Delo* that if a petitioner otherwise
 14 procedurally barred "presents evidence of innocence so strong that a court cannot have
 15 confidence in the outcome of the trial unless the court is also satisfied that the trial was
 16 free of nonharmless constitutional error, the petitioner should be allowed to pass through
 17 the gateway and argue the merits of his underlying claims." The standard for actual
 18 innocence for purposes of the "*Schlup* gateway" is lower than the *Herrera v. Collins*, [506](#)
 19 [U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203](#) (1993) standard applicable where the petitioner
 20 had a fair trial but is nevertheless actually innocent. To get through the *Schlup* gateway so
 21 that he can argue his otherwise procedurally barred constitutional claims, the petitioner
 22 must show that "it is more likely than not that no reasonable juror would have convicted
 23 him in light of the new evidence." *Schlup*, 513 U.S. at 327, [115 S.Ct. 851](#). Under this
 24 standard, "the newly presented evidence may indeed call into question the credibility of
 25 the witnesses presented at trial." *Id.* at 330, [115 S.Ct. 851](#). The Ninth Circuit held
 26 in *Carriger v. Stewart*, [132 F.3d 463](#) (9th Cir. 1997) that where the post-conviction
 27 evidence "casts a vast shadow of doubt over the reliability" of the conviction but only by
 28 undercutting the reliability of the proof of guilt, not by affirmatively proving innocence,

that can be enough to get through the *Schlup* gateway and allow consideration of otherwise barred constitutional claims, *Id.* at 477, despite being insufficient for a "freestanding" *Herrera* claim of innocence for a trial free of prejudicial constitutional error. *See Herrera*, [506 U.S. at 417, 113 S.Ct. 853](#). The AEDPA now provides that a claim that is procedurally barred because the petitioner "failed to develop the factual basis of [the] claim in state court proceedings" must be dismissed unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." [28 U.S.C. § 2254\(e\)\(2\)](#).

Where the new evidence "casts a vast shadow of doubt over the reliability" (*Carriger*, [132 F.3d at 477](#)) of the conviction such that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," (*Schlup*, [513 U.S. at 327](#), [115 S.Ct. 851](#)) it gets a petitioner through the *Schlup* gateway even if it merely impeaches credibility of prosecution evidence rather than affirmatively establishing actual innocence. *Carriger*, [132 F.3d at 481](#).

Petitioner has established her actual innocence in her petition by presenting credible evidence over the prosecution's unreliable circumstantial and hearsay evidence.

VII. CONCLUSION

For the reason stated above, Petitioner respectfully requests the court to proceed all claims presented by Petitioner, in the alternative, to proceed all deemed exhausted claims immediately.

Respectfully submitted,

Date: September 22, 2022

/s/ Xingfei Luo

DECLARATION OF PETITIONER XINGFEI LUO

I, XINGFEI LUO declare and state:

1. I am the Petitioner in this case. I sat through the jury trial commenced on Jul 27, 2021. I requested and received the entire discovery file from public defender in Sep 2021. I have personal knowledge of the facts stated herein. If called upon as a witness I could and would competently testify thereto.

2. For my post conviction relief, I requested appointment of counsel from superior court, court of appeal, California Supreme Court and all my requests were denied.

3. I independently drafted and submitted all prior state court habeas petitions without any assistance of counsel.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: September 22, 2022

/s/ XINGFEI LUO

XINGFEI LUO, In Pro Per

CERTIFICATE OF SERVICE

I declare that I am over 18 years of age, employed in the County of Los Angeles in the State of California, and not a party to the instant action. My business address is 2955 Mayflower Ave, Arcadia, CA 91006. I served the forgoing as follows:

USPS: By placing copies in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of the following persons at the following addresses:

Office of the Attorney General

300 South Spring Street

Los Angeles, CA 90013

Orange County District Attorney's Office

700 Civic Center Drive West

Santa Ana, CA 92701

Hon Robert A Knox

700 Civic Center Drive West

Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing is true and correct.

Executed on September 22, 2022

Emily

Emily Taylor